RECENT AMERICAN DECISIONS.

In the Supreme Court of New York, General Term, March, 1858.

PHILLIP C. WELLS *vs.* THE NEW YORK CENTRAL RAILROAD COMPANY.

1 Where the plaintiff was a free passenger on a railroad train, under a special contract with the carrier that the latter should not be liable to any damages arising from negligence, and was injured by a collision, it was held, that the contract was valid, and that the plaintiff could not recover unless he could show that the negligence was fraudulent, willful or reckless.

2. Signification of the word "negligence" in this contract.

The plaintiff was the holder of a free ticket issued by the defendants, which entitled him to a passage in the defendants' cars at his own pleasure. Upon this ticket was the endorsement quoted in the opinion, as constituting the contract between the parties. The plaintiff at the trial proved the collision, and the verdict was for the plaintiff under the direction of the circuit judge who tried the cause.

F. E. Cornwell, for plaintiff.
E. H. Avery, for defendant.

The opinion of the Supreme court was delivered by

SMITH, J.—In the conclusion of the judge at the circuit, that the plaintiff is entitled to recover in this action, I find myself unable to concur. The plaintiff received a free ticket from the defendants entitling him or permitting him to ride in their cars at his own pleasure, with an endorsement on his ticket by which "he expressly agreed that the Company should not be liable under any circumstances, whether of negligence by their agents or otherwise, for any injury to his person or for any loss or injury to his property."

These were the terms and conditions on which the defendants gave, and the plaintiff received, his ticket. It implies in effect an agreement on the part of the plaintiff to take the risk of all the

casualties attending railroad travel so far as they arose, or might arise, or result from negligence on the part of the officers and agents of the defendants. The defendants are a corporation engaged in carrying persons and property as common carriers. They are necessarily obliged to carry on their business through the instrumentality of numerous officers and other agents. From the character of the business, the great liability to accidents or injuries to persons and property resulting more or less in most cases from some degree of neglect or want of care on the part of some of their numerous employees, and the serious character of such injuries, the Company might well desire to restrict their liability to damages from such casualties to the narrowest possible limit. In respect to persons carried for hire, they could obviously impose no restrictions that should excuse them from the exercise of the utmost diligence and care.

But they are not obliged to carry any person, without compensation, at their own risk. They must have a clear right to contract with any such person that he must take his own risk. He would ride in the same cars with other passengers and would be liable to the same and no greater accidents; but as he paid nothing for his fare he might well agree to take his own risk. He knew that the Company was liable to suffer great loss and damage from the negligence of its agents, and that it would naturally seek to avoid and had a great interest in preventing such loss by every reasonable precaution.

But with the best of care and the utmost caution, some accidents he knew would unavoidably occur from the unforeseen negligence, carelessness, or want of skill of its employees. Against all such accidents, "*under any circumstances, whether of negligence by the agents of the defendants, or otherwise, the plaintiff expressly agreed to assume and take his own risk.*" This is the bargain. It is not unlawful. It is distinctly and fairly made and clearly understood. I cannot see why it is not fully binding to the extent of exempting the defendants from all loss or liability to loss or damage from injuries resulting from mere *negligence.* I do not see any ground to stop short of this exemption from loss or liability on the part of

the defendants within the entire range or scope of *negligence*, not arising from bad faith or fraud.

I see no ground to measure the *degrees* of *negligence*. The contract makes no degrees. It is sweeping and includes all *negligence*. It makes no exception of gross negligence. The plaintiff and defendant both knew that there was a liability to accidents from *gross* as well as from slight negligence. They use the word negligence, in its general legal sense, to embrace all accidents or injuries resulting from carelessness, or mere *nonfeasance*, of the defendant's agents.

Nothing else, it seems to me, will satisfy the fair meaning, the plain import of the contract. The plaintiff's injury resulted from a collision betwen the cars of the train in which he was riding as passenger and some cars standing on the track. It was of course a case of negligence to have such a collision, but collisions do happen quite frequently, and that was as well known to the plaintiff as to all the public. This cause of injury was most obviously within the contemplation of the parties, for it is the most fruitful cause of accidents and loss and injuries in railroad travelling. All collisions of trains must be the result of negligence in some degree, perhaps in the scale or degree of gross negligence. But with this ticket as his title and authority to ride in the defendant's cars, and as the contract on which the defendants agreed to carry him, I think the defendants are not liable for any injuries except such as were the result of fraudulent, willful, or reckless misconduct on the part of the defendant's officers or its agents. I put the exemption from liability from injuries resulting from negligence entirely upon the terms of the express agreement between the parties. If the plaintiff had been riding at the time gratuitously upon simply a free ticket, or upon invitation of defendants as matter of favor, courtesy, or otherwise, the defendants would be liable. The cases of *Philadelphia and Reading Railroad Company* vs. *Derby*, 14 Howard U. S. R. and of *Steamboat New World* vs. *King*, 16 How. 477, *Gillenwater* vs. *The Madison RR.*, 5 Indiana 339, fully established the rule that the common law liability of a carrier applies in such cases to all injuries resulting from negligence.

A common carrier for his hire, like other bailees for hire, may

clearly limit his risk by express contract, although long doubted, this is now distinctly settled. *Dow* vs. *New Jersey Steam Navigation Company*, 1 Kernan, 490; *Alexander* vs. *Green*, 2 Hill 20, 7 Hill, 333, S. C; *Wells & Tucker* vs. *The Steam Navigation Company*, 4 Selden, 381; *Parsons* vs. *Monteath*, 13 Barbour, 360; *Moore* vs. *Evans*, 14 Ib. 524; *Camden & Amboy RR.* vs. *Baldauf*, 16 Penn. 67; *Penn. RR.* vs. *M'Closkey*, 23 Ib. 526.

A carrier cannot contract for an exemption from losses arising from his own personal *fraud* or *gross negligence*. Such a contract would be *contra bonos mores*, and void. *Parsons* vs. *Monteath*; *Wells* vs. *Steam Navigation Co.*, supra.

But in the last case, Judge Gardiner says:—"Although the law will not suffer a man to claim immunity by contract against his own fraud I know of no reason why this may not be done in reference to *fraud or felony committed by those in his employment.*" If this be so, certainly he may contract for exemption from loss arising from the *negligence* of his servants and agents. This is the precise distinction that I would make, and is the precise point upon which I cannot agree with the decision at the circuit. But the judge at the circuit put the liability of the defendants on the ground that the collision which caused the injuries was *prima facie* gross negligence, and he held that the defendant could not stipulate for exemption from such neglect. The distinction between the several degrees of negligence is too nice and too artificial for any clear definition and practical application. As Judge Curtis, in 16 Howard, 477, says, it may well be doubted if these terms can be usefully applied in practice. Judge Story also remarks, Story on Bailments, § 99, that the law furnishes no definition of the terms "gross negligence," or "ordinary negligence," which can be applied in practice, and these distinctions are utterly repudiated by the late civil law writers.

But if by gross negligence the circuit judge means such neglect as implies fraud or bad faith on the part of the defendants, I can agree with him in his conclusions that for such negligence the defendants would be liable, but I do not think the evidence warrants any such finding as matter of fact. A bailee who is only liable for gross neglect is responsible only as a *naked depository* without

reward, which is the first class of bailments as classified by Sir William Jones, Jones on Bailments, 36. This class of bailees he says, page 46, "is only answerable for a *fraud* or for *gross neglect, which is considered evidence of it*, and not for such ordinary inattention as may be compatible with *good faith.*" If this *gross negligence* which is *evidence of fraud*, can be *rebutted* by evidence, that the depository keeps his own goods of the same kind in a manner equally negligent, then he is not liable, Edwards on Bailments, 69 and 70. It is enough that the bailee keep the property as his own. Idem. 72; *Foster* vs. *Essex Bank*, 17 Mass. 479.

It seems to me very clear that there is nothing in this case to warrant the finding that the defendants were guilty of such gross negligence as is equivalent to *fraud* or *evidence* of fraud. The plaintiff was riding in a car of a train which carried also the servants of the defendants, whose lives were in the same jeopardy with that of the plaintiff. A collision was likely to destroy much property of the defendants, and cause much loss of life besides the lives of their servants and agents, for which the company would be liable in heavy losses. There is and can be nothing in such a case upon which to base a *charge of fraud*, or bad faith on the part of the defendant's agents or officers. There was not such gross negligence as implies *fraud* or *is evidence of it.*

The defendants took the same care of the plaintiff that they did of themselves, their property and a large number of passengers, for whose safe passage they were bound to watch and guard with the strictest degree of diligence and care. In such a case I cannot think the defendants liable for the injuries sustained by the plaintiff, and the judgment of special term ought to be reversed and a new trial granted. Costs to abide the event. Judgment reversed.[1]

[1] Consult Story on Bailm. § 549; Angell on Carriers, § 50, 220, 221; Chitty on Carriers, p. 3, Am. ed., note, and cases there cited; Redfield on Railr., p. 269, note, 274, 275, 276; Pierce on Railr. p. 420, 421, 468.